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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
BYRD J. BOONE,
Respondent.
No. 203.

On Writ of Certiorari to the St. Louis Court of Appeals of the State of Missouri.

PETITION FOR REHEARING.

EDWARD J. WHITE,
MERRITT U. HAYDEN,
JAMES F. GREEN,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. Central 4477.

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PETITION FOR REHEARING.

Comes now the Missouri Pacific Railroad Company, petitioner in the above-entitled cause, and respectfully prays the Court to grant a rehearing of its decision entered in said cause on the 22nd day of March, 1926, because, in the opinion delivered in the cause, the Court overlooked and did not give consideration to the evidence offered on part of petitioner, as shown by the record, pages 22 to 32, tending to prove that, by action of the

Public Service Commission of Missouri, the tariffs and regulations of the Director General of Railroads had been continued in effect subsequent to the period of federal control, and were in effect at the time of the transportation of respondent's baggage.

In the last paragraph of the opinion of the Court (46 Sup. Ct. Rep. No. 12, page 345) the statement is made as to the methods by which the regulations adopted by the Director General might be continued in force, but the evidence offered in this case for the purpose of showing such facts was excluded by the trial court, and such exclusion was justified by the Court of Appeals because that Court held that, even if admitted, it could not help the railroad company, because it was liable as for a conversion (Rec., p. 88). This conclusion of the Court of Appeals was denied by this Court in the following language:

> "Under the federal law misdelivery is not deemed a conversion depriving a carrier of the benefit of the provision limiting liability. The sole question for decision is the construction and effect to be given section 208 (a)."

It was the contention of petitioner in the trial court and in the Court of Appeals that the evidence offered should have been admitted and that, when considered, it would clearly establish, as a matter of law, the carrier's right to limit its liability to the sum of $100.00.

The evidence offered shows that, in August, 1920, after the termination of federal control, the carriers of Missouri presented to the State Commission an application for the filing of tariffs containing the rates promulgated by the Director General and to have them continued in effect after the termination of such control. The Commission, in passing on the application, cited the provisions of the Transportation Act and said (Rec., p. 29):

> "The Transportation Act specifically provides that the rates promulgated by the Director General, as in effect February 29, 1920, shall continue in effect until changed by lawful authority. The record before this Commission at this time is not sufficient to justify any proceedings requiring a reduction of these rates; therefore, the application of the applicants for authority to lawfully file the tariffs containing the Director General's rates, as in effect on February 29, 1920, will be approved, but the Commission will retain jurisdiction of the subject matter of these rates, so that any rate which, by the Director General, was increased more than 25 per cent may be investigated upon complaint from any interested party or upon the Commission's own initiative."

And in its order in the case it was provided (Rec., p. 32):

> "That the increases herein authorized shall be effective for a period of six months from and after September 1, 1920, at which time said rates shall be **restored to the basis of rates in effect on February 29,**

> **1920,** unless the Commission shall extend the period of effectiveness or change the rates herein prescribed."

In the absence of evidence to the contrary, therefore, the rates which had been established by the Director General and in effect February 29, 1920, were in effect on the 3rd day of January, 1922, when respondent, with her baggage, was transported over the line of petitioner's railroad.

This Court, in its opinion in the case, holds that Section 9941, Revised Statutes of Missouri 1919, was still in effect in 1922 and governed the transportation of the baggage, but the Court of Appeals recognized that that section, which was contained in the Revised Statutes 1909 and simply carried forward in the revision of 1919, had been superseded by Section 10449, Revised Statutes 1919, which is a part of the Public Service Commission Act of Missouri adopted in the year 1913 (Session Acts 1913, page 556, Sec. 40).

The Court of Appeals stated its conclusion as follows (Rec., p. 89):

> "The shipment in the instant case was an intrastate shipment, and is governed by the laws of Missouri. Section 10449, R. S. 1919, makes defendant liable for the full value of the property lost, and under the Mis-

souri authorities above cited, this being an intrastate shipment **and defendant guilty of conversion,** the defendant would be liable for the full value."

The Court of Appeals, however, overlooked the fact that the portions of the section of the statute cited covered, in the main, merely the transportation of **property under a bill of lading** and the Court did not give effect to the concluding portion thereof covering **the transportation of baggage.** The concluding portion of the section is as follows:

> "Every common carrier and railroad corporation shall be liable for loss, damage and injury to property carried as baggage up to the full value and regardless of the character thereof, but the **value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier,** who may make a reasonable charge for the assumption of such liability in excess of one hundred and fifty dollars and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket. Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws (Laws 1913, p. 578)."

If effect be given to this portion of the Missouri statute, then, in no event, should the judgment in this case be for a greater sum than one hundred and fifty dollars ($150.00).

II.

It is also respectfully suggested in this petition for rehearing that, in the opinion of the Court in this case, the Court overlooked a former decision, to wit,

Lancaster v. McCarty, 267 U. S. 427.

In that case Chief Justice Taft, speaking for the Court, said (l. c. 430):

> "The writ of error is brought here under Section 237 of the Judicial Code, on the ground that this order of the Interstate Commerce Commission fixing the classification and rates thereunder is an authority exercised under the United States, which, by the contention of the shippers, was drawn in question and its validity denied by the state court. It is not disputed, therefore, that, if the order of the Interstate Commerce Commission and the Western Classification No. 56 apply, the judgment of the Court of Civil Appeals of Texas should be reversed."

And again (l. c. 431):

> "Such an order, of course, included classification as well as rates. The two are so bound together in the regulation of interstate commerce that the effect of both must be reasonable and without undue discrimination. The Interstate Commerce Commission, therefore, had full authority to issue this order for the adoption of the Western Classification for intrastate points between Houston and Cisco, both in

Texas. The conflict between the Revised Statutes of Texas and the order of the Interstate Commerce Commission can only be settled by recognition of the supremacy of the federal authority. It is plain from the agreed statements of facts that the only recovery which could be had under the Western Classification in this case was less than $60. The limitation of liability was in accordance with the second Cummins Amendment, was properly agreed to and was binding upon the shipper as well as the carrier."

In the case of

Wisconsin Railroad Commission v. C. B. & Q. R. R. Co., 257 U. S. 588,

is found this language:

"So, too, in practice when the State Commission shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the State Commissions may dispense with the necessity for any rigid federal order as to the intrastate rates and leave to the State Commissions power to deal with them and increase them or reduce them in their discretion."

The baggage check which was delivered to plaintiff was as follows:

"Missouri Pacific Railroad Company, transported subject to tariff regulations, W. H. Bissland, Gen'l Ag't. St. Louis, Mo., passenger's duplicate, from Jefferson City, Mo., to Sedalia, Mo., routed via Mo. Pac. R. R."

With respect to the baggage tariffs which were offered in this case and rejected in the trial court, petitioner sought to show that the Public Service Commission of Missouri had attempted to follow and did follow the suggestion contained in the portion of the Wisconsin case above quoted, by continuing in effect, after termination of the period of federal control, the regulations theretofore in effect covering the transportation of baggage. As petitioner was denied in the trial court and by the Court of Appeals the right to make this showing, it is respectfully submitted that this petition for rehearing should be sustained and the judgment of the Court of Appeals of Missouri reversed.

EDWARD J. WHITE,
MERRITT U. HAYDEN,
JAMES F. GREEN,
Attorneys for Petitioner.

I, James F. Green, one of the counsel for petitioner in the above cause, do hereby certify that this application is presented in good faith and not merely for delay.

James F. Green

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OCTOBER TERM, 1924. 1925

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
BYRD J. BOONE,
Respondent.

No. 203

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO ST. LOUIS COURT OF APPEALS.

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Attorney for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. Central 4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
BYRD J. BOONE,
Respondent.
No. 727.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO ST. LOUIS COURT OF APPEALS.

To the Honorable, the Supreme Court of the United States:

STATEMENT.

Petitioner seeks, by its petition filed in this court on the 15th day of November, 1924, a writ of certiorari to review the judgment of the St. Louis Court of Ap-

peals of the State of Missouri, rendered by that Court in the case of Byrd J. Boone v. Missouri Pacific Railroad Company, No. 18,481, on the docket of said court, which said judgment was rendered and became final on the 11th day of July, 1924.

The judgment sought to be reviewed was originally rendered in the Circuit Court of the City of St. Louis in favor of plaintiff, respondent herein, in the sum of one thousand sixty dollars ($1,060.00), as damages for the loss of the contents of a trunk shipped as baggage over the lines of the defendant, petitioner herein, between Jefferson City, Missouri, and Sedalia, Missouri, admitted to be wholly in intrastate commerce, such shipment having been made on the 3rd day of January, 1922, long after the termination of federal control on February 29, 1920, and the six months twilight period thereafter, which terminated September 1, 1920.

Your respondent resists the issuance of the writ for further review of this judgment upon the following grounds:

BRIEF.

I.

The application for the writ was not filed within three months after the date of the judgment sought to be reviewed as required by law.

Act of Sept. 6, 1916, Chap. 448, Sec. 6 (39 Stat. L. 726, 727), Sec. 1228a U. S. Com. Stat. 1916;
Fed. Stat. Ann. Sup. 1918, p. 422;
Rust Land & Lumber Company v. Jackson et al., 250 U. S. 71, 63 L. Ed. 850, 39 S. C. R. 424.

(a) The St. Louis Court of Appeals was the highest state court in this case.

Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 64 L. Ed. 255, 40 S. C. R. 133, and cases there cited;
M. K. & T. Ry. Co. v. Elliott, 184 U. S. 530, 46 L. Ed. 673, 22 S. C. R. 446.

II.

There is no federal question involved.

(a) After the termination of the twilight period provided under Section 208a of the Transportation Act of 1920 (41 Stat. L. 464, Chap. 91, Sec. 208a) on

September 1, 1920, state statutes regulating intrastate commerce by common carriers automatically revived and were in force thereafter ex proprio vigore.

Public Service Commission, Second District, v. N. Y. Central R. R. Co., 230 N. Y. 149, 129 N. E. 455, 14 A. L. R. 449;
Public Service Commission, Second District, v. N. Y. Central R. R. Co., 268 Fed. 558.

(b) Especially is this true where the statute involves a regulation of liability and not primarily of rates.

Lancaster v. Smith, 262 S. W. (Tex. Com. App.) 74.

(c) The Missouri statute makes the carrier liable for full loss and damage.

Sec. 10449, R. S. Mo. 1919;
Marshall & Michel Grain Co. v. R. R., 176 Mo. 480, 75 S. W. 638;
Bowles v. Payne, 251 S. W. (Mo. App.) 101.

(d) Even though the state court decides a federal question, if the judgment also rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the Supreme Court of the United States will not take jurisdiction.

Hammond v. Johnston, 142 U. S. 73, 35 L. Ed. 941, 12 S. C. R. 141.

ARGUMENT.

Aside from the jurisdictional question arising by reason of the failure of petitioner to file its petition within the time prescribed by statute, it is our contention that there is nothing in this record for this Court to review. The basis of petitioner's contention is the exclusion from evidence by the trial court of certain tariffs alleged to have been filed with the Interstate Commerce Commission and an order of the Public Service Commission of Missouri, which it is alleged had to do with a limitation of liability for loss of baggage. The evidence offered is incorporated by petitioner in its abstract of record filed on appeal to the St. Louis Court of Appeals and brought here as a part of the record in this application. It is our contention that the admission of all of the evidence appearing in this record as having been so refused would not and could not have altered or changed the decision of this case.

Section 208a of the Transportation Act of 1920 (41 Stat. L. 464, Chap. 91, Sec. 208a) purported to continue in effect all rates and regulations which were in effect on the last day of federal control, and which, under the decisions of this Court, were applicable alike to interstate and intrastate commerce until September 1, 1920, and thereafter until changed by "authority of law."

This Court, taking judicial notice as it does of the statutory law of all of the states (Lamar v. Micou, 114 U. S. 219, 223, 29 L. Ed. 94, 5 S. C. R. 857), knows that Missouri has a Public Service Commission with powers and duties as to rate matters on intrastate business analogous to those of the Interstate Commerce Commission on interstate business, and that under Sections 10438-10444, R. S. Mo. 1919, tariff rates, charges, rules or regulations, in order to be effective on intrastate shipments in Missouri, must be filed with that Commission.

The defendant, on the trial, offered in evidence a certain decision of the Missouri Public Service Commission authorizing the filing of certain tariffs as of September 1, 1920, and it will be clear to the Court from an examination of the decision so offered, which is a part of the record herein, that the Missouri Public Service Commission thereby resumed its control of intrastate commerce as authorized by the Transportation Act, and that such control was "authority of law," as provided by section 208a. The order so offered only **authorized the filing** of certain tariffs.

Defendant offered in evidence extracts from certain tariffs which it stated were filed with the Interstate Commerce Commission, such extracts being rules limiting liability for loss of baggage, in the absence of a declaration of excess value, to $100.00. Plaintiff specifically objected to such tariff evidence upon the

ground, inter alia, that "there is no showing that the rates therein contained were in effect on intrastate movements in Missouri at the time the trunk in question was lost," and no effort was made by defendant to supply the lack of evidence suggested by such objection.

Upon the defendant's own evidence, therefore, it appears that the Missouri Public Service Commission, by authority of law, resumed its control of intrastate commerce as to rates, rules and regulations, and authorized the filing of tariffs; but the record is silent as to what, if any, tariffs were filed pursuant to such authority, what the provisions thereof were and whether they were in effect at the time of the shipment in question. Upon that state of the record there was nothing to take this shipment out of the operation of section 10449, R. S. Mo. 1919, providing full liability upon the part of the carrier for loss or damage to baggage under the decisions of the Missouri courts hereinbefore cited, and the decision of the Court of Appeals rests on that ground.

The full liability statute was in effect prior to federal control. Counsel contend that it was suspended during federal control. That question need not be debated here, as it is not involved in this case. Federal control ended February 29, 1920, except for the extension of rates and regulations by Section 208-a of the Transportation Act of 1920,

which ended September 1, 1920. No one will contend that the statute of Missouri was repealed; at most it was merely suspended, and when the terms of its suspension ceased it became again effective, according to the weight of authority as we have been able to find it. The question has been so decided in New York by both state and federal courts. The learned Federal Court, in Public Service Commission v. New York Central R. R., 268 Fed. 558, state that they are advised the question will be carried to the Supreme Court of the United States, but a diligent search discloses no further judicial determination of that case. The New York cases were rate cases. This one is a mere question of regulation. This identical question has been very recently determined by the Commission of Appeals of Texas, in Lancaster v. Smith, 262 S. W. 74, in a well-reasoned opinion, which we commend to the favorable consideration of this Court.

To summarize, the Director General's tariffs were not ipso facto operative to cover this shipment, because:

(a) It was made long after federal control terminated;

(b) The Missouri Public Service Commission, being "authority of law," had acted in the premises, and

(c) The Missouri statute providing full liability had been restored to its pristine vigor.

No tariff lawfully filed in Missouri was introduced in evidence showing any restriction of liability. It results, therefore, that no right or privilege claimed under authority of the United States by the defendant below, petitioner here, has been transgressed, consequently there is no foundation for the jurisdiction of this Court and the writ should be denied.

There are other grounds upon which this judgment must at all events be sustained, but for the purpose of this motion we have chosen to meet petitioner upon the battleground of his own choice.

Respectfully submitted,

MORTON JOURDAN,

Attorney for Respondent.